Supreme Court, U.S.
FILED
081523 JUN 8 - 2009
OFFICE OF THE CLERK

No. 08-

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY LIONETTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Pl.
Ardmore, PA 19003
(610) 649-8200

June 2009

QUESTIONS PRESENTED

1.a. Do Due Process and the Sixth Amendment jury trial right permit a sentence to be increased on account of conduct for which the jury has acquitted the defendant at trial?

b. In avoidance of that constitutional question: Do the Sentencing Guidelines in any event exclude such "acquitted conduct" from treatment as "relevant conduct" if the sentencing court has not found the conduct to be criminal in nature?

c. If the "acquitted conduct" sentence increase was allowable at all, should the burden of proof not have been at least "clear and convincing evidence"?

2.a. Is "restitution" to the IRS in a federal income tax evasion case an illegal sentence under 18 U.S.C. § 3556?

b. If so, is such an illegal sentence a kind of plain error that should be corrected whenever noticed on direct appeal?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Anthony Lionetti and the United States). A co-defendant, Donald DuBeck, pleaded guilty and testified for the government. He did not appeal.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
LIST OF ALL PARTIES ii
INDEX TO APPENDIX iv
TABLE OF AUTHORITIES v

PETITION
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS, STATUTE, FEDERAL RULE AND SENTENCING GUIDELINE INVOLVED 2
STATEMENT OF THE CASE
a. Procedural History 4
b. Statement of Facts 6
c. Statement of Lower Court Jurisdiction 7
REASONS FOR GRANTING THE WRIT
1. This case squarely presents the important question, which has arisen again in the wake of Booker and has troubled the lower courts, of the limits of a federal court's authority to enhance a sentence on the basis of conduct for which the defendant has been acquitted of charges by the the jury 7
a. Only this Court can address and resolve the lower courts' persistent disquiet over the "acquitted conduct" issue 8

b. A proper construction and strict application of the "relevant conduct" rule avoids many of troubling aspects of the "acquitted conduct" problem 11
c. Articulating and applying at least a "clear and convincing" burden of proof would also avoid the constitutional issue in many cases 23
2. The lower courts need clarification and guidance that an illegal federal sentence is ordinarily plain error, to be noticed and corrected at any time on direct appeal, and that this Court's decision in Cotton represents a narrow exception to that general rule 24
CONCLUSION 31

INDEX TO APPENDIX

A. Opinion of the Court of Appeals, 298 Fed.Appx. 212 (Nov. 12, 2008) ..... Appx. A1
B. Order of the Court of Appeals denying rehearing (Jan. 8, 2009) ..... Appx. B1

TABLE OF AUTHORITIES

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 11
Almendarez-Torres v. United States,
523 U.S. 224 (1998) 23
Ashwander v. Tennessee Valley Authority,
297 U.S. 288 (1936) 12
Braxton v. United States, 500 U.S. 344 (1991) 11
Concrete Pipe & Products of California, Inc.
v. Construction Laborers Pension Trust,
508 U.S. 602 (1993) 12
Cunningham v. California, 549 U.S. 270 (2007) 10
Edwards v. United States, 523 U.S. 511 (1998) 13
Gall v. United States, 552 U.S. --,
128 S.Ct. 586 (2007) 13
Heflin v. United States, 358 U.S. 415 (1959) 27, 29
Hill v. United States, 368 U.S. 424 (1962) 29
Hughey v. United States, 495 U.S. 411 (1990) 27
Irizarry v. United States, 553 U.S. --,
128 S.Ct. 2198 (2008) 10
Jones v. United States, 526 U.S. 227 (1999) 13
Kimbrough v. United States, 552 U.S. --,
128 S.Ct. 558 (2007) 11
Rita v. United States, 551 U.S. 338 (2007) 9
Rodriguez de Quijas v. Shearson/American
Express, Inc., 490 U.S. 477 (1989) 11
Slodov v. United States, 436 U.S. 238 (1978) ... 21, 22
Tenet v. Doe, 544 U.S. 1 (2005) 11
Tinder v. United States, 345 U.S. 565 (1953) 29
U.S. ex rel. Attorney General v.
Delaware & Hudson Co., 213 U.S. 366 (1909) 12

United States v. Booker,
543 U.S. 220 (2005) 8, 9, 11, 12
United States v. Canania, 532 F.3d 764
(8th Cir. 2008) 9
United States v. Candelario, 240 F.3d 1300
(11th Cir. 2001) 30
United States v. Concepcion, 983 F.2d 369
(2d Cir. 1992) 9
United States v. Cotton, 535 U.S. 625 (2002) ... 28, 29
United States v. Dickler, 64 F.3d 818
(3d Cir. 1995) 15
United States v. Dove, 247 F.3d 152
(4th Cir. 2001) 15
United States v. Evans, 155 F.3d 245
(3d Cir. 1998) 30
United States v. Faust, 456 F.3d 1342
(11th Cir. 2006) 9
United States v. Frady, 456 U.S. 152 (1982) 27
United States v. Grier, 475 F.3d 556
(3d Cir. 2007) (en banc) 23
United States v. Helmsley, 941 F.2d 71
(2d Cir. 1991) 26
United States v. Kikumura, 918 F.2d 1084
(3d Cir. 1990) 23
United States v. Lopez, 514 U.S. 549 (1995) 12
United States v. Macedo, 406 F.3d 778
(7th Cir. 2005) 30
United States v. Minneman, 143 F.3d 274
(7th Cir. 1998) 26

United States v. Neff, 954 F.2d 698
(11th Cir. 1992) 26
United States v. Nolen, 472 F.3d 362
(5th Cir. 2006), aff'd after remand,
543 F.3d 732 (5th Cir. 2008) 25, 26
United States v. Peterson, 101 F.3d 375
(5th Cir. 1996) 15
United States v. Pimental, 367 F.Supp.2d 143
(D.Mass. 2005) 9
United States v. Pivorotto, 986 F.2d 669
(3d Cir. 1993) 28
United States v. Ressam, 553 U.S. --,
128 S.Ct. 1858 (2008) 14
United States v. Schaefer, 291 F.3d 932
(7th Cir. 2002) 15
United States v. Settles, 530 F.3d 920
(D.C.Cir. 2008) 9
United States v. Shafer, 199 F.3d 826
(6th Cir. 1999) 15
United States v. Sheahan, 31 F.3d 595
(8th Cir. 1994) 15
United States v. Snider, 957 F.2d 703
(9th Cir. 1992) (per curiam) 26, 30
United States v. Watts, 519 U.S. 148
(1997) (per curiam) 7, 8, 10-12, 15, 23
United States v. White, 551 F.3d 381
(6th Cir. 2008) (en banc) 8
Williams v. New York, 337 U.S. 241 (1949) 23
Williams v. Oklahoma, 358 U.S. 576 (1959) 8
Witte v. United States, 515 U.S. 389 (1995) 8, 13

CONSTITUTION, STATUTES AND RULES

U.S. Const., amend. V (double jeopardy) 2, 7, 8
U.S. Const., amend. V (due process) 2, 23
U.S. Const., amend. VI (jury trial) 2, 9, 10
U.S. Const., amend. XIV (due process) 8
18 U.S.C. § 371 ..... 4, 26
18 U.S.C. § 3231 7
18 U.S.C. § 3553(a) 5, 13
18 U.S.C. § 3556 25
18 U.S.C. § 3563(b) 25
18 U.S.C. § 3583(d) 25
18 U.S.C. § 3661 11
18 U.S.C. § 3663 ..... 25, 26
18 U.S.C. § 3663A 25, 26
21 U.S.C. § 841(b) 28
26 U.S.C. §§ 3401-3402 20
26 U.S.C. § 3403 21
26 U.S.C. § 6671 ..... 17, 19, 21, 22
26 U.S.C. § 6672 ..... 17, 19, 22
26 U.S.C. §§ 7201-7344 19
26 U.S.C. § 7201 ..... 4, 7, 25
26 U.S.C. § 7202 ..... 7, 13, 15-17, 20, 22
26 U.S.C. § 7343 ..... 19, 20, 22
26 U.S.C. § 7501 20
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1291 7
28 U.S.C. § 2101(c) 1
28 U.S.C. § 2106 29
28 U.S.C. § 2255 ..... 27, 29, 30

Fed.R.Crim.P. 52(b) 26
Fed.R.Evid. 404(b) 5
Fed.R.Evid. 609 5
Rule 13.1, 13.3, 30.1 1
Rule 52(b) 29
USSG. ch.1.A., ¶4(a) (p.s.) 13
USSG § 1B1.3 ..... 11, 13, 14, 21
USSG § 1B1.3, Appl. Note 9(B) 19
USSG § 2T1.1 14
USSG § 2T1.6 14
USSG § 2T4.1 ..... 10, 14
USSG § 3D1.2(d) 14

MISCELLANEOUS

Breyer, Hon. Stephen, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L.Rev. 1 (1988) .. 13
Erlinder, C. Peter, "Doing Time" ... After the Jury Acquits, Wm. Mitchell Coll. of Law Legal Studies Res. Paper No. 91 (2008) 9
Int.Rev.Man., ch. 1.2.1 (Policies of the Internal Revenue Service Handbook), P-5-60 (1993) 22
Int.Rev.Man., ch. 5.7 (Trust Fund Handbook) (2008) 22
Note, James J. Bilsborrow, Sentencing Acquitted Conduct to the Post-Booker Dustbin, 49 Wm. & Mary L.Rev. 289 (2007) 9
Stith, Kate, & Jose A. Cabranes, Fear of Judging (1998) 13

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ANTHONY LIONETTI respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit filed and entered on November 12, 2008.

OPINIONS BELOW

The Third Circuit's non-precedential Opinion (per Jordan, J., with McKee & Fuentes, JJ.) was filed on Nov. 12, 2008; see United States v. Lionetti, 298 Fed. Appx. 212; Appx. A; see also 102 AFTR2d 2008-6962. The United States District Court for the District of New Jersey (Kugler, J.) wrote no opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the petitioner's conviction and sentence was filed and entered on November 12, 2008. A copy is attached as Appendix A. A timely petition for rehearing was denied on January 8, 2009. Appx. B. On March 31, 2009, under No. 08A853, Justice Souter extended the time for filing this petition to and including June 7, 2009, a Sunday. This petition is timely filed on or before the first business day thereafter. Rules 13.1, 13.3, 30.1; 28 U.S.C. § 2101(c). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTE, FEDERAL RULE, AND SENTENCING GUIDELINE INVOLVED

The **Fifth Amendment to the Constitution of the United States** provides, in pertinent part, that "No person shall ... be deprived of life, liberty, or property, without due process of law; ...." The **Sixth Amendment to the Constitution** provides, in pertinent part, that "In all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury ..., and to be informed of the nature and cause of the accusation ...."

Section 2106 of title 28, U.S. Code, provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse, any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106.

The **Federal Rules of Criminal Procedure** provide, in pertinent part:

> **Rule 52. Harmless Error and Plain Error.**
>
> * * * *
>
> **(b) Plain Error.** Plain errors or defects affecting substantial rights may be noticed

> although they were not brought to the attention of the court.

Fed.R.Crim.P. 52(b).

The "relevant conduct" rule of the **United States Sentencing Guidelines** provides, in pertinent part:

> **§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)**
>
> (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level, (ii) special offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; ...
>
> * * * *
>
> that occurred during the commission of the offense of conviction, ... ;
>
> (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of

the same course of conduct or common scheme or plan as the offense of conviction;

* * * *

USSG § 1B1.3(a).

STATEMENT OF THE CASE

This petition presents two important and recurring questions implicating the legality of petitioner's sentence.

a. Procedural History

Petitioner Anthony Lionetti was a medical doctor practicing in New Jersey. On April 26, 2005, petitioner and a co-defendant were indicted in the District of New Jersey on sixteen counts of tax offenses. Petitioner was convicted after a two-week jury trial on three counts of personal income tax evasion, 26 U.S.C. § 7201. The same jury acquitted him of fifteen additional counts charging conspiracy to defraud the United States, 18 U.S.C. § 371, and willful failure to collect and pay over employment taxes, 26 U.S.C. § 7202, associated with Lionetti's medical practices.

The defense at trial was that Dr. Lionetti's former business manager, a witness for the government at trial, had embezzled from petitioner and then, to cover up the thefts, failed to transmit the payroll tax or file tax returns that Dr. Lionetti signed and thought were filed. Almost ten years earlier, the former manager had been convicted of a similar theft from a prior employer.

On May 31, 2007, petitioner was sentenced, inter alia, to serve 41 months' imprisonment (the bottom of the guidelines range determined by the district court), to pay a $7500 fine and to pay $246,791 in "restitution" to the Treasury. His appeal of the convictions raised an evidentiary issue. He also challenged the reasonableness of his sentence, focusing in part on the court's calculation of the applicable "tax loss" under the Sentencing Guidelines based on the conduct for which he was acquitted. Assuming that the judge would in any event stay within the guideline range, the four-level difference adds more than a year's imprisonment (a 50% increase) to the sentence.

The Third Circuit ruled that the trial court had not erred, after allowing evidence about the prior conviction to impeach this witness under Fed.R.Evid. 609, by excluding additional evidence proffered by the defendant under Fed.R. Evid. 404(b) in the form of testimony from victims of the prior similar theft. Appx. A; 298 Fed.Appx. at 215. The court of appeals also held that the district court did not err when it increased the sentence on account of "relevant conduct" of which the jury had acquitted petitioner, id. 217, and that the 41-month sentence had not been imposed in disregard of the pertinent factors under 18 U.S.C. § 3553(a).

On petition for rehearing, petitioner Lionetti challenged the panel's application of the "relevant conduct" rule and the legality of the sentencing order to pay "restitution." Rehearing was denied. Appx. B.

b. Statement of Facts

The facts as related at trial are summarized in the Third Circuit's opinion, Appx. A, as follows:

> Lionetti is a physician and the sole owner of two medical practices in New Jersey focused on the treatment of Lyme Disease. Donald DuBeck was the business manager of those practices. ...[fn.2] ....
>
> FN2. The government calculated that Lionetti's two medical practices owed the Internal Revenue Service ("IRS") approximately $2.1 million for the years 2000 to 2005, and that Lionetti owed the IRS $246,791 for past due personal income taxes for the years 1999 to 2001.
>
> At trial, DuBeck testified that he told Lionetti that he did not file any "payroll tax forms" for Lionetti's medical practices from 1999 to 2001. In his defense, Lionetti claimed ignorance and testified that DuBeck had sole responsibility for the business administration and the finances of both practices. Lionetti also claimed that DuBeck was embezzling money by diverting patient funds to himself and that DuBeck failed to file Lionetti's personal income tax returns "so he could keep the money." ....

Appx. A-2 to -3.

c. Statement of Lower Court Jurisdiction

The United States District Court for the District of New Jersey had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed there. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

1. This case squarely presents the important question, which has arisen again in the wake of Booker and has troubled the lower courts, of the limits of a federal court's authority to enhance a sentence on the basis of conduct for which the defendant has been acquitted of charges by the jury.

The court below affirmed the district court's imposition of an increase in petitioner's sentence for personal income tax evasion, in violation of 26 U.S.C. § 7201, based upon conduct for which the jury acquitted him under 26 U.S.C. § 7202 at the same trial -- willful failure to ensure the payment of employment taxes. Appx. A, at 7-8. In United States v. Watts, 519 U.S. 148 (1997) (per curiam), this Court held that relying on "acquitted conduct" in this way does not violate the Double Jeopardy Clause or improperly deny the defendant the benefit of the acquittal. Whether that ruling stands as binding precedent can only be decided by this Court.

a. Only this Court can address and resolve the lower courts' persistent disquiet over the "acquitted conduct" issue.

Under United States v. Watts, an "acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." 519 U.S. at 157. In United States v. Booker, 543 U.S. 220, 240 & n.4 (2005), this Court noted the "very narrow" Double Jeopardy question presented and decided in Watts,[1] which was rendered without full briefing and argument.[2] Nevertheless, that holding remains binding on all the lower federal courts, despite widespread doubt as to its fairness or constitutional soundness. See, e.g., United States v. White, 551 F.3d 381 (6th Cir. 2008) (en banc) (9-6

[1] The foundation of the Watts decision was two earlier decisions of this Court where the defendant had not been acquitted, but rather had previously been convicted of and sentenced for the conduct used again to aggravate his sentence in a later prosecution. See Witte v. United States, 515 U.S. 389, 402-03 (1995) (explaining "relevant conduct" rule); Williams v. Oklahoma, 358 U.S. 576, 584-86 (1959) (no due process/double jeopardy violation in death sentence for kidnaping, based on aggravating circumstance of victim's death, where defendant had previously been prosecuted for the same victim's murder in a different county/venue and sentenced to life imprisonment).

[2] Justice Kennedy dissented from the summary reversal on this very ground. 519 U.S. at 170-71. Justice Stevens dissented on the merits. Id. 170.

decision; Merritt, Martin, Daughtrey, Moore, Cole & Clay, JJ., dissenting), cert. denied, No. 08-9523 (4/27/09); United States v. Canania, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring), cert. denied, No. 08-6775 (11/17/08); United States v. Settles, 530 F.3d 920, 923-24 (D.C.Cir. 2008) (Kavanaugh, J., recognizing appearance of unfairness); United States v. Faust, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring); United States v. Concepcion, 983 F.2d 369, 395-96 (2d Cir. 1992) (Newman, J., dissenting from denial of rehearing: application of "relevant conduct" rule to acquitted conduct is "bizarre" and "must be modified"); United States v. Pimental, 367 F.Supp.2d 143 (D.Mass. 2005).[3]

Not only was this Court in Booker at pains to leave open the possibility of a Sixth Amendment issue with respect to acquitted conduct, as already noted (citing 543 U.S. at 240 & n.4), but several post-Booker opinions help focus the nature of that question. As first suggested by Justices Scalia and Thomas in their concurring opinion in Rita v. United States, 551 U.S. 338 (2007), a Sixth Amendment constitutional issue arises from the very process of substantive appellate review for reasonableness -- a question that manifests itself acutely in "acquitted conduct" cases such as petitioner's.

---

[3] Academic commentators share these concerns. E.g., C. Peter Erlinder, "Doing Time" ... After the Jury Acquits, Wm. Mitchell Coll. of Law Legal Studies Res. Paper No. 91 (2008); Note, James J. Bilsborrow, Sentencing Acquitted Conduct to the Post-Booker Dustbin, 49 Wm. & Mary L.Rev. 289 (2007).

If an elevated sentence is only lawful, that is, if the sentence could only be deemed "reasonable" on appeal, when one or more particular findings -- here, that Dr. Lionetti engaged (notwithstanding the jury's verdict) in a pattern of corporate employment tax violations related to his personal income tax evasion -- can be factually sustained, then the Sixth Amendment arguably requires that the jury make that determination. Accord, Irizarry v. United States, 553 U.S. --, 128 S.Ct. 2198, 2204 (2008) (Thomas, J., concurring); Gall v. United States, 552 U.S. --, 128 S.Ct. 586 (2007) (Scalia, J., concurring); Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 867 & n.11, 166 L.Ed.2d 856, 886-87 (2007) (Alito, J., with Kennedy & Breyer, JJ., dissenting). Under that theory, petitioner's 41-month sentence as a nonviolent first offender convicted of three years' tax evasion totalling under $250,000 in unpaid taxes (and no particularly sophisticated means or methods of evasion), see Appx. A-2 to -3,[4] would be unconstitutional on account of having been aggravated by the "acquitted conduct" determination.

The exceptional importance of this issue is evident, the issue is recurrent, and it cannot, even theoretically, be fully resolved by Sentencing Commission action. Cf. Watts, 519 U.S. at 158-59

[4] The total "tax loss" -- which drives the advisory Guideline range under USSG § 2T4.1 -- including the "acquitted conduct," on the other hand, exceeded $2 million. Appx. A-2 to -3 n.2. The "tax loss" for the "acquitted counts" was thus more than 88% of the total.

(Breyer, J., concurring); Braxton v. United States, 500 U.S. 344, 347-48 (1991) (given Commission's power of revision, Court will not ordinarily grant certiorari to resolve dispute about interpretation of Sentencing Guidelines).[5] Given the holding in Watts, only this Court can fully address the constitutional issue. See Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989); see also Tenet v. Doe, 544 U.S. 1, 10-11 (2005); Agostini v. Felton, 521 U.S. 203, 237 (1997) (lower federal courts not to infer overruling of Supreme Court precedent).

For this reason, certiorari should be granted.

b. A proper construction and strict application of the "relevant conduct" rule avoids many of troubling aspects of the "acquitted conduct" problem.

Even in its application of the decision in Watts, the Third Circuit erred in its reasoning. Focusing on the premise that it is not unconstitutional for a sentencing judge to rely on acquitted conduct in applying the "relevant conduct" rule, USSG § 1B1.3, the court below overlooked that not all acquitted

[5] Regardless of the extent to which 18 U.S.C. § 3661 may limit the Sentencing Commission's authority to declare certain evidence irrelevant to Guidelines sentencing, see Watts, 519 U.S. at 158 (Scalia, J., concurring) (but see id. 160-62 (Stevens, J.)), any restriction adopted by the Commission would not be binding on sentencing judges after Booker and Kimbrough v. United States, 552 U.S. --, 128 S.Ct. 558 (2007), in any event. Hence, the constitutional question can no longer be fully avoided.

conduct is necessarily "relevant" under that rule. In petitioner Lionetti's case, in particular, no sufficient finding exists to show that it was. Yet this was an included and necessarily prior question to the constitutional point addressed by the court of appeals. Properly understood, Watts stands for the proposition that conduct underlying an acquittal may nevertheless be considered, if reliably proven for sentencing purposes, to establish a proposition that the guidelines make pertinent, such as "relevant conduct." Had that antecedent question been answered correctly, the constitutional issue could have been avoided.

Avoidance of this difficult constitutional question affords another reason to decide in petitioner's favor the point addressed in the preceding Reason. Indeed, since the serious constitutional difficulties identified by the many jurists who have questioned the viability of Watts after Booker can often be avoided by a careful and strict application of the relevant conduct rule, any other reading of the rule is one that a court must eschew. See United States v. Lopez, 514 U.S. 549, 562 (1995); Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 628-30 (1993) (compiling cases on avoidance of unnecessary constitutional issues); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); U.S. ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909); see also Jones v. United States, 526 U.S. 227, 239-40

(1999) (doctrine of "constitutional doubt"). If strict application of the "relevant conduct" rule does not avoid the problem, however, then this case squarely presents the issue that a majority of this Court has now identified as troubling.

One of the "key compromises" built into the federal guideline sentencing system under the Sentencing Reform Act is the "modified conviction offense" principle, under which the applicable guideline is determined initially by the offense of conviction and then certain "real offense" elements are considered in choosing the appropriate sentence -- but only when, how, and to the extent that the Commission has provided. See USSG ch.1.A., ¶4(a) (p.s.); Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L.Rev. 1, 8-12 (1988). One of the cornerstones of that compromise was the "relevant conduct" rule. "Relevant conduct" under the guidelines is a term of art elaborated and defined in USSG § 1B1.3. See generally Edwards v. United States, 523 U.S. 511, 514 (1998); Witte v. United States, 515 U.S. 389, 402-03 (1995); Kate Stith & Jose A. Cabranes, Fear of Judging 70 (1998) ("the 'principle' of 'relevant conduct' is unknown outside of the federal Sentencing Guidelines.").

A sentence is reversible as "unreasonable" if it is based on the district court's consideration, pursuant to 18 U.S.C. § 3553(a)(4), of an erroneous guideline calculation. See Gall v. United States, 552 U.S. --, 128 S.Ct. 586, 596 (2007). "Tax loss" from the § 7202

employment tax violations with which petitioner Lionetti was charged but of which he was then acquitted may be added to adjust his tax evasion sentence upward under USSG §§ 2T1.1 (evasion guideline) and 2T4.1 (tax table) if the conduct underlying the acquitted counts is "relevant."

It counts as "relevant" if USSG § 1B1.3(a)(2) applies. That provision covers other conduct that was part of the "same course of conduct or common scheme or plan as the offense of conviction,"[6] so long as that conduct involved offenses which would "group" (if all involved convictions) under USSG § 3D1.2(d).[7] However, there is one additional element, which the courts below overlooked: to qualify as "relevant," any violations of tax law additional to the counts of conviction had to rise to the

---

[6] The court below cited only § 1B1.3(a)(1). Appx. A7. Standing alone, however, that subsection would not cover the acquitted conduct at issue, because the employment tax offenses (allegedly committed on various specific dates in 1999 and 2001, none of which were in April) were not acts engaged in "during the commission of" the charged personal income tax evasion (which occurred, according to the indictment, "on or about April 15" of the years 2000 and 2001, and "in or about May" of 2002). Cf. United States v. Ressam, 553 U.S. --, 128 S.Ct. 1858 (2008) (statute prohibiting an act if committed "during" the commission of another offense does not necessarily require proof of any other relationship between the two offenses).

[7] Here, that rule applies, because had there been convictions on the employment tax counts, the Guideline calculation for those counts would fall under USSG § 2T1.6, which always groups pursuant to § 3D1.2(d) with counts under § 2T1.1 (covering tax evasion).

level of criminal conduct. United States v. Schaefer, 291 F.3d 932, 939 (7th Cir. 2002); United States v. Dove, 247 F.3d 152, 155 (4th Cir. 2001); United States v. Shafer, 199 F.3d 826, 831 (6th Cir. 1999); United States v. Peterson, 101 F.3d 375, 385 (5th Cir. 1996); United States v. Dickler, 64 F.3d 818, 830-31 (3d Cir. 1995); United States v. Sheahan, 31 F.3d 595, 600 (8th Cir. 1994) (all "relevant conduct" must be criminal in nature).

For some "acquitted conduct," such as the additional drug transactions involved in Watts, this criminality requirement (once the conduct itself is deemed proven) is not particularly problematic. Not so in tax cases, where most violations are civil or administrative in nature, not criminal. For lack of proof that any employment tax violations committed by petitioner involved criminal acts, the district court's treatment of the "acquitted conduct" as "relevant conduct" was erroneous, without reaching the constitutional question.

Had petitioner been convicted of the § 7202 charges, of course, proper verdicts would establish the criminality of the conduct for sentencing purposes. However, in the absence of a conviction, the district court had to find more than that Dr. Lionetti "was responsible for the unpaid employment taxes." Appx. A8 (referring to CA3 App. A351-52). His failure to ensure their payment by the corporations that were legally the "employer" and thus liable for the employ-

ment taxes,[8] had to be "willful" and otherwise criminal in nature, not merely a civil tax violation. Section 7202 of the Internal Revenue Code provides, in pertinent part:

> Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall ... be guilty of a felony ....

26 U.S.C. § 7202. As noted, the principal "person required ... to collect," etc., is the employer, which in this case was a corporation. Taking account of this critical point, the indictment charged (in a paragraph of Count One that was incorporated into the § 7202 counts) that petitioner as well as his business manager and co-defendant DuBeck, "were both persons responsible for collecting, accounting for, and paying over employment taxes for [the corporate employers]." Indictment, at 2(¶8), 8(¶1). The criminal statute (unlike the equivalent civil provision), however, refers to persons "required" to do the act, IRC § 7202, not just a person "responsible for" the taxes.

The jury instructions (CA3 App. A320 (26); A547-48, § 34), taken verbatim from the government's proposed points for charge (D.C. Doc. 30, ¶42, at 56), show that the district court believed that to be

---

[8] At no time was Dr. Lionetti a sole proprietor or otherwise personally the "employer" liable to collect and pay the taxes discussed in this petition.

guilty of the § 7202 employment tax offense, one had only to be an individual "responsible for" the tax obligations of a corporate employer. This, in turn, according to the jury instructions, meant to be a "responsible person" as defined in the case law under 26 U.S.C. §§ 6671-6672, a civil penalty and collection provision of the Internal Revenue Code. But in criminal cases a different statute applies. Any objection to this grievous error in the jury instructions, of course, is now moot. However, the record contains no factual findings suggesting that the district court applied the statutory standards at sentencing that are necessary for petitioner's conduct in this regard to be deemed criminal and not merely a matter of civil liability. Accordingly, there was never a proper finding of "relevant conduct."

Judge Kugler's pertinent sentencing findings, in full, were:

> Under [USSG 2T1.1, A]pplication Note [2] explains what related [sic] conduct is in a tax case.
>
> It says in determining the total tax loss attributable to the offense, all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan, unless the evidence demonstrates that the conduct is clearly unrelated. The following examples are illustrative of conduct that is part of the same course of conduct or common scheme or plan. A, there is a continuing

pattern of violations in the tax laws by the defendant.

I don't really credit much of what Donald Du[B]e[c]k said at trial. However, there was sufficient evidence, the court does find by a preponderance of the evidence that Doctor Lionetti is, in fact, responsible under the Sentencing Guidelines for more than two million dollars in tax losses. The acquittal means nothing more than the jury was not convinced beyond a reasonable doubt that he had the necessary criminal willfulness. But to argue he didn't know his obligation to pay these other taxes strains credulity. He knew as early as 2002 that there was a criminal tax investigation ongoing in this matter. ... [Ba]sed on the bankruptcy filings, Lionetti knew he had employment tax issues and he owed employment taxes for 1988, '89, 1995, 1997 and 1998. Clearly he knew he had an obligation to pay these taxes. He clearly knew, and he just didn't do it. And to argue that he was too busy in his practice to worry about these things doesn't help him at all. He's an educated man. He's a doctor who had notice of his tax deficiencies. He did nothing. He can't bury his head in the sand.

So I do find by a preponderance of the evidence that he is responsible under the

> Sentencing Guidelines, and all you need to do also is look at the factors and a cross reference also to 2[T]1.1 at 1[B]1.3(a), which also seemed to fit his situation[,] which is the degree of similarity of the offenses, the regularity or repetition of the offenses, and the time intervals between the offenses[,[9]] that this is related [sic] conduct. It is countable toward Doctor Lionetti, and, therefore I do find that we start at an offense level of 22.

CA3 App. A351-52. Nothing in these findings satisfied the requirements to establish that Dr. Lionetti was individually, criminally liable for the nonpayment of the corporation's employment taxes.

Rather than § 6672 (and the definition in id. § 6671(b)), relied on by the district court, at the government's behest, it is the standard found in id. § 7343) which governs. The latter section provides a definition of "person" when used to establish vicarious criminal responsibility for a tax offense:

> The term "person" as used in this chapter [IRC ch. 75, 26 U.S.C. §§ 7201-7344] includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

---

[9] Referring to and quoting from USSG § 1B1.3, Appl. Note 9(B).

26 U.S.C. § 7343 (emphasis added).[10] As noted above, the requirement that petitioner must, by virtue of being "president" of the corporation which owned his practice ("as such officer"), have been "under a duty to perform the act in respect of which the violation occurs" was never acknowledged, much less applied, by the district court.[11] However, before criminal liability could be found for purposes of sentencing, the court was obligated to make all legally necessary findings. While a finding of criminal "willfulness" might be inferred from the findings with respect to knowledge of the legal requirement that the corporation withhold and pay over certain employment taxes, the source and terms of that legal "duty," as applied to Dr. Lionetti personally, were never articulated or even implied.

That petitioner was the owner and president of the corporation that was the "employer" did not, as a matter of tax law (particularly criminal tax law) make him personally liable for a tax offense committed by

---

[10] Of course, "the act in respect of which the violation occur[red]" in this case was the required periodic paying over of trust fund taxes to the IRS, after withholding them from wages. See 26 U.S.C. §§ 3401-3403 [requirement of withholding from employees], 7501 [amounts withheld "shall be held to be a special fund in trust for the United States"].

[11] The same fundamental deficiency, as manifested in the jury charge, was rendered moot by petitioner's acquittal on the § 7202 charges.

that corporation.[12] "Congress ... has not made corporate officers personally liable for the corporation's tax obligations generally ...." Slodov v. United States, 436 U.S. 238, 254 (1978). Here, the district court never found that Dr. Lionetti was "an officer or employee of a corporation ... who as such officer [or] employee ... is under a duty to perform the act in respect of which the violation occurs." Whether petitioner was, by virtue of his position as president and owner of the corporate employer, himself in fact and law under a duty to ensure that employment tax was withheld and paid over is something the government would have to prove; the court would then have to find that acquitted conduct to be "criminal" and otherwise "relevant" under the Guidelines, USSG § 1B1.3.[13]

True, the statutory language of § 6671(b), defining individual responsibility for the civil penalty

---

[12] The duty to withhold and pay over employment taxes is imposed by the Internal Revenue Code only on an "employer," IRC § 3403, which in this case was not petitioner but rather the corporation.

[13] If there is any law directly imposing such a "duty" on a person in petitioner's position, neither the district court nor the government has ever cited it. If that "duty" existed, on the other hand, not as a matter of law but rather by virtue of the contractual or fiduciary nature of his office or employment ("as such officer [or] employee") by virtue of some written or implied contract, or corporate resolution, or the like, that, too, would be a matter of fact that the prosecution would have the burden to establish (in light of petitioner's acquittal at trial) for sentencing purposes.

under § 6672 is basically identical to that of § 7343. Slodov suggests in dictum that the standards are the same. See 436 U.S. at 245, 247. Once ensuring that the statutory test was met, the court could presumably have gone on to consider the factors made pertinent by Treasury regulations.

The IRS itself advises its collection officers to make a determination, in civil cases under IRC § 6672(b), "dependent on the facts and circumstances of each case." Int.Rev.Man. (Trust Fund Handbook) ¶ 5.7.3.3.1(1) (2006). Being an officer or owner "cannot be the sole basis for a responsibility determination." Id. ¶ 5.7.3.3.1.1(2). See also Int.Rev.Man., ch. 1.2.1.5.14 ("Responsibility is a matter of status, duty, and authority. ... In order to make accurate determinations, all relevant issues should be thoroughly investigated.") (Policies of the Internal Revenue Service Handbook, P-5-60, 1993). The test is thus fact intensive and, in a criminal case, entirely suitable for jury determination, and even made by a judge for sentencing purposes not automatic or mechanical.

In a criminal case under §§ 7202 and 7343, unlike a civil tax penalty case under §§ 6671-6672, the duty/responsibility issue would have to be squarely determined (in the circumstances of this case, at sentencing), not casually assumed, before the court could find the requirements necessary to establish as "relevant conduct" the very acts for which the jury acquitted the defendant.

In avoidance of the constitutional question, this Court should address and affirm that "relevant conduct" must be criminal in nature, and must be established and not merely assumed. This is particularly so when underlying the problematic use of "acquitted conduct."

c. Articulating and applying at least a "clear and convincing" burden of proof would also avoid the constitutional issue in many cases.

Another protection against unfair sentencing on the basis for which the jury acquitted would be the application under the Due Process Clause of a higher burden of proof than is required for ordinary sentencing findings, that is, a mere preponderance of the evidence. See Watts, 519 U.S. at 156; Williams v. New York, 337 U.S. 241 (1949). This Court has twice noted, however, the existence of a significant, unresolved issue whether Due Process might require a more stringent standard at sentencing under special circumstances. See Almendarez-Torres v. United States, 523 U.S. 224, 247-48 (1998); Watts, 519 U.S. at 156-57 & n.2; see also United States v. Kikumura, 918 F.2d 1084, 1100-01 (3d Cir. 1990) (Becker, J.), overruled by United States v. Grier, 475 F.3d 556 (3d Cir. 2007) (en banc). This case presents that issue in the context of a year's increase in the sentence based on "acquitted conduct." Together with the underlying issue, certiorari should be granted to consider the applicable standard of proof.

Given the district court's concession, in agreement with the jury, that the testimony of the government principal witness was mostly unworthy of belief, the trial evidence could not rightly be said to satisfy a "clear and convincing" standard, even if it could meet a "preponderance" test, much less the "reasonable doubt" test that ought to be applied if the defendant is to be treated as if convicted of an entirely separate offense.

The petition for certiorari should be granted.

2. The lower courts need clarification and guidance that an illegal federal sentence is ordinarily plain error, to be noticed and corrected at any time on direct appeal, and that this Court's decision in Cotton represents a narrow exception to that general rule.

As part of the sentence imposed on petitioner Lionetti, the district court ordered that he pay $246,791 in "restitution" to the United States Treasury.[14] The court below affirmed the sentence. Yet the restitution portion of petitioner's sentence is flatly illegal. Despite the absence of any objection in the district court, nor issue raised on appeal until the rehearing stage, no law authorizes such restitution. Certiorari should be granted to establish that an illegal sentence is plain error which by its nature

[14] The restitution amount equals petitioner's unpaid personal income taxes for the three years of conviction for tax evasion. See Appx. A-1 n.2.

ordinarily constitutes a miscarriage of justice requiring correction on appeal.

The Sentencing Reform Act, in 18 U.S.C. § 3556, provides that restitution shall be imposed if applicable under 18 U.S.C. § 3663A (the Mandatory Victims' Restitution Act) and may be imposed if allowed under id. § 3663 (the Victim and Witness Protection Act).[15] Section 3663A does not apply to a conviction for willfully attempting to evade income tax, because tax evasion (26 U.S.C. § 7201) is not "an offense against property under this title," 18 U.S.C. § 3663A(c)(1)(A)(ii), that is, title 18. Similarly, section 3663 does not apply, because it only authorizes restitution "when sentencing a defendant convicted of an offense under this title, or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472) ...." 18 U.S.C. § 3663(a)(1)(A). Income tax evasion is simply not covered.

The circuits which have addressed the question all agree that federal law does not allow restitution to be imposed as a part of the sentence in tax cases. See United States v. Nolen, 472 F.3d 362, 382 (5th Cir. 2006) (restitution not authorized as penalty for tax

---

[15] In addition, some courts have held that 18 U.S.C. § 3583(d)(3), by incorporating as discretionary conditions of supervised release the available conditions of probation set forth in id. § 3563(b), has made an order of "restitution" of unpaid taxes (see id.(b)(2)) a possible condition of supervised release following imprisonment. No such condition of post-incarceration supervision was imposed in this case, however, so that possibility is immaterial.

offenses), revised sentence aff'd after remand, 543 F.3d 732 (5th Cir. 2008); United States v. Minneman, 143 F.3d 274, 283-84 (7th Cir. 1998) (restitution not authorized for title 26 offense, but can be ordered for violation of 18 U.S.C. § 371 to commit that offense or related "conspiracy to defraud the United States"); United States v. Snider, 957 F.2d 703, 705-07 (9th Cir. 1992) (per curiam, order on rehearing) (restitution not authorized for offense under title 31); United States v. Neff, 954 F.2d 698, 700 (11th Cir. 1992) (government conceded point in tax case); United States v. Helmsley, 941 F.2d 71, 101 (2d Cir. 1991) (no restitution for tax case under title 26, but allowed to the extent loss resulted from tax-related conspiracy offense under 18 U.S.C. § 371).

Yet when this error, overlooked in the district court, was pointed out in the court of appeals, the plain error was left uncorrected. This Court's intervention is required to establish that imposition of an illegal sentence is, by its nature, a miscarriage of justice which undermines the reputation of the courts and calls in all but extraordinary cases for correction as plain error under Fed.R.Crim.P. 52(b).

The counts charging Dr. Lionetti in this case included only one under title 18 (the Count One conspiracy), and he was acquitted on that charge. The district court thus violated the express limitations of § 3663(a) and § 3663A when it imposed restitution in this case,[16] and the Third Circuit over-

[16] The legal unavailability of such an order was presumably so apparent to the Probation Office that the PSI

looked plain error -- an illegal sentence -- when it affirmed that judgment. The restitution statute, as a law defining criminal punishment, must be strictly construed and enforced, with restitution limited to those offenses, and only in those circumstances, allowed by Congress. Hughey v. United States, 495 U.S. 411 (1990).

Although not challenged by petitioner prior to the filing of his petition for rehearing, an illegal sentence, such as the restitution imposed here, is ordinarily plain error. This Court has implied, but not held, as much. See Heflin v. United States, 358 U.S. 415 (1959) (illegal consecutive sentence, for offense inapplicable to petitioner in light of convictions on other counts, vacated by unanimous Court on post-conviction attack, without mention of effect of lack of prior objection or appeal).[17] The standard for establishing plain error on direct appeal cannot be more stringent than that for obtaining collateral relief under 28 U.S.C. § 2255. See United States v. Frady, 456 U.S. 152, 164-67 (1982). Section 2255

_____(cont'd)

simply states, without explanation, "Restitution is not an issue in this case." PSI ¶127, at 29. The government filed no objection to this paragraph in the draft report. See PSI Addendum (5/11/07).

[17] Cf. Rosenberg v. United States, 346 U.S. 273, 293-96 (1953) (opinion for 6 Members respecting denial of stay; considering on its merits argument that death penalty was inapplicable to petitioners' offense, presented for first time on successive application for stay of execution); id. 299-300 (Black, J., dissenting: illegality of sentence would necessarily constitute plain error).

itself expressly recognizes as a separate category of grounds for relief "that the sentence was in excess of the maximum authorized by law," as petitioner claims the restitution aspect of his sentence is here.[18] No more onerous showing of a miscarriage of justice can properly be required on direct appeal.

All the criteria for establishing plain error are necessarily satisfied by an illegal sentence claim, unless the record leaves no room for reasonable doubt about facts that would otherwise justify the sentence as a matter of law. See United States v. Cotton, 535 U.S. 625, 631-34 (2002) (life sentence not "plain error," where charged degree of offense carried 20-year maximum, but uncontested facts required life and defendant, who failed to object at sentencing, was not unfairly surprised).[19] Here, there are no

---

[18] Nor does the Third Circuit decision in United States v. Pivorotto (Appeal of Woods), 986 F.2d 669, 674-75 (3d Cir. 1993) (Becker, J.), support the judgment below. The Woods court ruled that a sentence of restitution which was apparently legal (under that Circuit's case law) when imposed, the validity of which was placed in doubt by a subsequent decision of this Court which the Circuit held non-retroactive on collateral attack -- need not be "corrected" under former Rule 35(a). The restitution imposed here, by contrast, was illegal under existing law at the time of imposition.

[19] In Cotton, this Court chose to pretermit the prior question of statutory construction and never articulated whether drug quantity was intended by Congress to be an element of a greater offense under 21 U.S.C. § 841(b). Instead, on the basis of a strategic governmental concession of undefined sentencing error (treated interchangeably in certain parts of the opinion as indictment error),

conceivable facts that could bring the case within the Cotton exception; restitution for the offenses of conviction is not authorized at all, regardless of the facts.

Before November 1, 1987, an illegal federal sentence could be corrected "at any time." Fed.R. Crim.P. 35(a) (former version). See Hill v. United States, 368 U.S. 424, 430 n.8 (1962); Heflin, 358 U.S. at 422 (concurring op. of five Justices, per Stewart, J.). When Congress (not this Court and the Judicial Conference Rules Committee) repealed that provision in connection with the enactment of the Sentencing Reform Act, the purpose was not to leave some illegal sentences in place in the name of finality, but rather because it was assumed that any which escaped notice on appeal could be corrected under the illegal sentence clause of § 2255. But that safety valve was

_____(cont'd)

the Court held that the Rule 52(b) plain error standard was not made out. The question presented in Tinder v. United States, 345 U.S. 565 (1953), was essentially indistinguishable from that in Cotton (which did not cite it), except that Tinder came before the Court on review of the denial of § 2255 relief, challenging a sentence imposed upon a guilty plea (and therefore the plain error rule, including its discretionary aspect, did not apply, as discussed in text above). In Tinder, the Court overturned a felony sentence where only a misdemeanor had been alleged, citing 28 U.S.C. § 2106 (obligation of appellate court "to do justice as the case requires," id. 570. The entitlement to relief under § 2255 from an illegal sentence arose in Tinder on the basis of a post-conviction, authoritative articulation of the elements of the offense. If an illegal sentence is to be automatically corrected in that procedural posture, then surely the same follows under § 2106 on direct appeal.

shut in 1996, with the enactment of the Antiterrorism and Effective Death Penalty Act, imposing for the first time a statute of limitations on habeas corpus and the cognate § 2255 remedy. In that light, the plain error rule must be applied generously on appeal, not tightly, in the sentencing context.

As Chief Judge Becker succinctly and forthrightly put the point a decade ago, "imposing a sentence not authorized by law seriously affects the fairness, integrity, and reputation of the proceedings." United States v. Evans, 155 F.3d 245, 252 (3d Cir. 1998). Indeed, the question of the legality of a sentence is so essential that it can even be raised, as here, for the first time on petition for rehearing -- or, if the Third Circuit's order denying relief implies otherwise, then there is a split in the Circuits on that subsidiary procedural point. The Ninth Circuit has allowed it, in accepting the government's petition raising for the first time an argument to support the legality of a restitution order, in Snider, 957 F.2d at 706 n.1. Accord, United States v. Macedo, 406 F.3d 778, 789 (7th Cir. 2005); United States v. Candelario, 240 F.3d 1300, 1311 (11th Cir. 2001).

For lack of statutory basis, petitioner's restitutionary sentence is illegal. This Court should grant certiorari to make explicitly clear that an appellate court, however belatedly, should notice any illegal sentence when it comes to the court's attention, even

if not raised below.[20] On remand, the part of the judgment illegally ordering Dr. Lionetti to pay criminal restitution must be vacated.

CONCLUSION

For the foregoing reasons, petitioner ANTHONY LIONETTI prays that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit affirming his sentence.

Respectfully submitted,

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
Attorney for Petitioner

June 7, 2009

---

[20] Even if proof of prejudice were pertinent, the government would not be placed in an unfair position by an order directing the district court to correct the illegality in petitioner's sentence at this time. A conviction for tax evasion collaterally estops a taxpayer in civil or administrative proceedings from contesting facts determined in the criminal case, and even from contesting certain civil penalties. Dr. Lionetti's civil tax liability will thus remain unchanged, and he will have to comply with a special condition of supervised release that he "fully cooperate with the Internal Revenue Service," including that he "fully cooperate by paying all taxes, interest and penalties due, and otherwise comply with the tax laws of the United States." CA3 App. A4 (Judgment of Sent.), at 3.

APPENDIX A

Cite as: 298 Fed.Appx. 212

NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-2725

UNITED STATES of AMERICA

v.

ANTHONY LIONETTI,

Appellant.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 05-cr-00310)
District Judge: Honorable Robert B. Kugler.

Submitted Under Third Circuit LAR 34.1(a)
July 22, 2008
Before McKEE, FUENTES, and JORDAN, Circuit Judges.

Filed Nov. 12, 2008

Alan Hechtkopf, Esq., John Hinton, III, Esq., United States Department of Justice, Washington, DC, for United States of America.

Carl D. Poplar, Esquire, Cherry Hill, NJ, for Anthony Lionetti.

OPINION OF THE COURT

JORDAN, Circuit Judge.

*1 On October 13, 2006, a jury found Anthony Lionetti guilty of income tax evasion. Lionetti raises essentially two issues on appeal. First, he claims that the United States District Court for the District of New Jersey erred by excluding what he characterizes as "reverse 404(b) evidence" at trial. (Appellant Br. at 36.) Second, he argues that the sentence imposed by the District Court was, for various reasons, improper. We will affirm the District Court's evidentiary ruling and the sentence it imposed.[1]

I. Factual and Procedural Background

Lionetti is a physician and the sole owner of two medical practices in New Jersey focused on the treatment of Lyme disease. Donald DuBeck was the business manager of those practices. On April 26, 2005, Lionetti and DuBeck were indicted on sixteen counts of tax evasion for failure to pay personal income taxes and for failure to pay employment taxes associated with Lionetti's medical practices. Count One of the indictment charged Lionetti and DuBeck with conspiracy to evade taxes in violation of 18 U.S.C. § 371. Counts Two through Twelve charged them with failure to account for and pay federal employment taxes in violation of 26 U.S.C. § 7202. Counts Thirteen through Fifteen charged Lionetti with personal income tax evasion in violation of 26 U.S.C. § 7201,[2] and,

---

[1] The District Court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

[2] The government calculated that Lionetti's two medical practices owed the Internal Revenue Service ("IRS")

under that same statute, Count Sixteen charged DuBeck with personal income tax evasion. Lionetti and DuBeck initially pled not guilty to all of the charges, but before trial, DuBeck entered into a plea agreement pursuant to which he pled guilty to Counts One and Sixteen and agreed to testify against Lionetti in exchange for a favorable sentencing recommendation.

At trial, DuBeck testified that he told Lionetti that he did not file any "payroll tax forms" for Lionetti's medical practices from 1999 to 2001. In his defense, Lionetti claimed ignorance and testified that DuBeck had sole responsibility for the business administration and the finances of both practices. Lionetti also claimed that DuBeck was embezzling money by diverting patient funds to himself and that DuBeck failed to file Lionetti's personal income tax returns "so he could keep the money." (Appellant Br. at 39.) To prove his point, Lionetti sought to introduce testimony pertaining to a 1994 theft conviction of DuBeck for diverting funds to himself when he purported to be a representative of Northwestern Life Insurance Company ("NLIC"). Lionetti wanted victims of that earlier crime "to testify that they gave money to DuBeck and trusted him to transmit the money to the insurance company." (Appellant Br. at 22.) Lionetti argued that the evidence should be admitted as "reverse 404(b) evidence" because it demonstrated "a common scheme or plan" on DuBeck's part, as opposed to DuBeck's propensity to commit a crime. (App. at A213.) The District Court declined to admit the evidence.

_____(footnote continued)

approximately $2.1 million for the years 2000 to 2005, and that Lionetti owed the IRS $246,791 for past due personal income taxes for the years 1999 to 2001.

Lionetti was found guilty with respect to the personal income tax evasion charges, but acquitted of the conspiracy and employment tax evasion charges. During sentencing, however, the District Court considered the employment tax evasion charges, finding by a preponderance of the evidence that Lionetti was responsible for "more than two million dollars in tax losses." (App. at A351-52.) The Court determined that Lionetti's base offense level under the Sentencing Guidelines ("Guidelines") was 22 as opposed to 18; the latter being the level it would have been if only the personal income tax evasion charges were considered.

*2 At the sentencing hearing on May 31, 2007, Lionetti argued that he should receive downward departures "based upon [his] medical service to the community and the extraordinary level of care and devotion he provided to his patients." (Appellant Br. at 30.) The District Court denied Lionetti's applications for downward departures, stating that "a doctor['s] very devoted patient base ... [is not] so exceptional, so extraordinary that he's entitled to a downward departure under the Guidelines ..." (App. at A359.) After undertaking the requisite sentencing analysis under 18 U.S.C. § 3553(a), the Court sentenced Lionetti to 41 months' imprisonment, which was the lowest sentence recommended under the Guidelines for an offense level of 22. Lionetti was also sentenced to three years' supervised release, a fine of $7,500 and restitution to the IRS in the amount of $246,791. This timely appeal followed.

II. Discussion

Lionetti argues before us that the District Court erred in excluding the testimony pertaining to DuBeck's prior theft conviction and in imposing sentence. We address those contentions in turn.

A. The District Court Did Not Err in Excluding the Testimony Pertaining to DuBeck's Prior Theft Conviction[3]

Lionetti argues that the District Court erred "in prohibiting [him] from using 'reverse 404(b)' evidence on cross-examination regarding [ ] DuBeck's nearly identical thefts." (Appellant Br. at 36.) Rule 404(b) provides that "[e]vidence of other crimes ... is not admissible to prove the character of a person" although it may be admissible for "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed.R.Evid. 404(b). Lionetti claims that the evidence he sought to introduce-that is, testimony from the victims of DuBeck's 1994 theft-"goes directly" to all of Rule 404(b)'s exceptions, except identity, because it is relevant to his defense. (Appellant Br. at 38.) We disagree.

First, Lionetti provides no specific explanation as to why he believes this evidence falls within Rule 404(b)'s exceptions. See United States v. Morley, 199 F.3d 129, 133 (3d Cir. 1999) ("a proponent's incantation of the proper uses of such evidence under [Rule 404(b)] does not magically transform inadmissible evidence into admissible evidence"). Second, that the evidence might have been relevant[4] to Lionetti's defense does not, in itself, render

---

[3] We review the District Court's evidentiary ruling for an abuse of discretion. United States v. Givan, 320 F.3d 452, 463 (3d Cir. 2003).

[4] Even accepting Lionetti's assertion that DuBeck had responsibility for filing Lionetti's personal income tax returns and failed to do so, we confess difficulty in understanding how a parade of witnesses about DuBeck's 1994 theft conviction bears in any meaningful way on Lionetti's personal income tax evasion charges, the only charges of which he was convicted in this case.

the evidence admissible; it must still come within one of the articulated exceptions in Rule 404(b). See id. (evidence must be "both relevant and admissible for a proper purpose) (emphasis added). Lionetti wanted to introduce the evidence to show a "common scheme or plan" on DuBeck's part to embezzle and divert funds. The District Court noted, however, that Lionetti could not "clearly articulate how the evidence fits into a chain of logical inferences, no link of which may be the inference that ... [DuBeck] ... has the propensity to commit the act charged." The District Court did not abuse its discretion in finding the evidence inadmissible under Rule 404(b).[5]

_____(footnote continued)

His theory requires not only that the jury accept the story about DuBeck handling Lionetti's personal as well as business taxes but that it also accept that Lionetti was so divorced from his own individual responsibility-including the responsibility to sign his tax returns-that he had no idea his taxes were not being filed. Any "common scheme or plan" connection with the 1994 theft is tenuous, to say the least.

[5] Lionetti also argues that the evidence should have been admitted under Federal Rule of Evidence 609(a)(2), which allows into evidence proof that a witness has been convicted of a crime. The argument is misplaced, however, because the District Court did allow into evidence the information permitted by Rule 609, namely that DuBeck had been convicted of the 1994 offense. Moreover, salient facts underlying that conviction were discussed during DuBeck's testimony. (See App. at A215 (noting that DuBeck "testified [during trial] that[ ] he had diverted ... premiums and put it into a business account").)

B. The District Court Did Not Err in Sentencing Lionetti[6]

*3 Next, Lionetti argues that the District Court erred during sentencing. He claims that his sentence was unreasonable and unconstitutional because the Court considered as "relevant conduct" under the Guidelines conduct for which he was charged but acquitted. He also argues that his vocation as a leading and revered Lyme disease physician should have served to reduce his sentence. None of these contentions are persuasive.

1. That Lionetti's Base Offense Level Included Consideration of Conduct for Which He Was Acquitted Does Not Render the Sentence Unreasonable

Lionetti claims that it was unreasonable for the District Court to use the employment tax evasion charge for which he was acquitted to determine his base offense level. Under the Guidelines, a court may consider "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" when determining a base offense level. Sentencing Guidelines Manual § 1B1.3(a)(1)(A). Acquittal does not render conduct irrelevant, since a finding that the government has failed to prove guilt beyond a reasonable doubt is a far cry from a finding that the defendant did not do what he was accused of doing. The

---

[6] We review sentences for reasonableness, and a sentence is reasonable so long as the trial court did not abuse its discretion such that the court "[had] a reasoned basis for exercising ... legal decision-making authority." See Rita v. United States, 127 S.Ct. 2456, 2465-68 (2007) ("reasonableness review merely asks whether the trial court abused its discretion") (internal quotations omitted).

Supreme Court has explained that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." United States v. Watts, 519 U.S. 148, 157 (1997).

The District Court found, by a preponderance of the evidence, that Lionetti was responsible for the unpaid employment taxes because he knew from a prior bankruptcy filing that he owed employment taxes but still did not pay them. (See App. at A352 (noting that "based on ... bankruptcy filings, Lionetti knew he had employment tax issues and he owed employment taxes").) This finding is supported by the record and was well within the Court's discretion. Lionetti contends that, because the Court's finding increased the range of his advisory Guidelines sentence, it violated the Sixth Amendment. That argument is without merit, because the "Sixth Amendment [does not] automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." Rita, 127 S.Ct. at 2466-67. The District Court did not err by taking Lionetti's employment tax evasion charge into account during sentencing.

2. The District Court Did Not Err in Sentencing Lionetti to 41 Months' Imprisonment

Lionetti further claims that the District Court erred because it did not give meaningful consideration to the Section 3553(a) factors in imposing a sentence of 41 months' imprisonment.[7] See United States v. Cooper, 437

---

[7] Lionetti further argues that the Court should have imposed a lower sentence due to "other mitigating circumstances."

F.3d 324, 329 (3d Cir. 2006) (sentence is reasonable only where "the trial court gave meaningful consideration to the § 3553(a) factors"). Lionetti points to the fact that a number of his patients attended the sentencing hearing to support him and wrote letters on his behalf, which, he claims, demonstrates that his patients will be harmed if he is imprisoned and that his sentence should be adjusted accordingly.[8]

*4 During sentencing, the District Court considered Lionetti's important work as a physician treating Lyme disease, but also noted that sentencing always impacts third parties. (See App. at A358 ("it would be a very unusual case where a sentencing does not impact third parties").) The record before us is clear that the District Court took the § 3553(a) factors into account when

(footnote continued)

(Appellant Br. at 57.) It is unclear whether Lionetti's blanket assertion is distinct from his argument pertaining to the 3553(a) factors. In any event, the District Court did not abuse its discretion. The Court explicitly acknowledged and considered the purported "mitigating circumstances." (See App. at A359 (noting that the patients "loved" Lionetti and that there was "no question [the] patients swear by him.").)

[8] Lionetti also argues that the District Court erred by denying his motion for downward departures based on his medical service. He claims that the Court did not consider his motion because it rejected the downward departures before he presented his witnesses in support of the departure. The record, however, reflects that the District Court considered Lionetti's applications on their merits and decided not to grant them. We will not disturb that decision. See United States v. Cooper, 437 F.3d 324, 332-33 (explaining that, post-Booker, we continue to "decline[ ] to review discretionary decisions to deny departure, unless for allegation of legal error").

imposing Lionetti's sentence (see App. at A363 (the Court noting the "need to consider the factors under § 3553(a)(1)" and then proceeding to address each of them), and that the 41-month term of imprisonment was reasonable.[9]

III. Conclusion

For the foregoing reasons, we will affirm the judgment of conviction and sentence imposed by the District Court.

---

[9] Finally, despite Lionetti's arguments to the contrary, 18 U.S.C. § 3553(a)(6) is not "violated" by Lionetti's receiving a longer sentence than DuBeck did because, as the Court noted, DuBeck was "in a different category" than Lionetti since he cooperated with the government.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-2725
UNITED STATES OF AMERICA
v.
ANTHONY LIONETTI, Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 05-cr-0310)
District Judge: Honorable Robert B. Kugler

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, and HARDIMAN, Circuit Judges

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for

rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT:

/s/ Kent A. Jordan
Circuit Judge

Dated: January 8, 2009
tmk/